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Borders: the case of Gibraltar

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Introduction

Gibraltar provided the first outcome of the Brexit referendum with 96% voting against it in June 2016. This outcome, together with the impact of the exit of the UK from the European Union, recently brought the attention of the British media to this part of the Mediterranean. Other countries with border issues that will be affected by Brexit obviously include the Republic of Ireland, and the Republic of Cyprus, if we take into consideration the British bases in the Republic of Cyprus Akrotiri and Dhekelia. Gibraltar, like other British Overseas Territories, is of strategic importance for both the current and for a post-Brexit British Foreign Policy. The British bases in Cyprus for example are also of considerable geopolitical importance especially considering that Cyprus is not a member of NATO, but Spain joined the North-Atlantic Alliance in 1982 during the negotiations of its membership to the EU (European Community at that time). However, there are several issues of mainly a political nature that places Gibraltar in an exceptional situation. The discussion over Gibraltar between the UK and Spain started with the Utrecht Treaty in 1713 when the disagreement over the sovereignty of the isthmus took place. Since then, and ongoing during the 20th century, other events such as the development of the airport over territory that is considered by Spain to be their own, has added another layer to this long-standing problem.

In 1969, as a consequence of these and other disputes, Franco decided to close the border between Gibraltar and Spain. This meant that Gibraltarians and Spaniards could not cross the border, with

the consequent loss of jobs for the later and the need to trade with other countries for the former. This move and its consequences for families divided by this border, is still in the memory of many Gibraltarians, fuelling a nationalistic sentiment to some extent. Once Franco died (1975) and democracy was re-established in Spain, the idea of joining the European Union became a much-desired goal by politicians and the society. The UK (and Ireland) had only joined a few years before (1973), and the border and the future of Gibraltar was rediscussed with Spain. As a consequence of these discussions between Spain and the UK, the Declaration of Lisbon of 1980 and the Brussels Agreement of 1984, together with the opening of the border, normalised relations between both countries. This eliminated any obstacles to the Spanish membership of the EU, but the future of Gibraltar and the claims over the sovereignty of the isthmus and the airports' land, was not fully resolved and both countries agreed to continue to converse and discuss these matters as the Brussels Agreement indicated.

The EU decided that the issue of Gibraltar had to be discussed at bilateral level between the UK and Spain from the very beginning and it was the same after the Brexit referendum. In the same way that the UK could have vetoed the Spanish entrance to the EU in the 1980s, during the negotiations of Brexit, Spain could, in theory have become a barrier in these negotiations – especially after the EU suggested in April 2017 that Spanish consent over the negotiations with Gibraltar would be sought.

The negotiations between Spain and the UK over Gibraltar – of which outcome would end up included in the Withdrawal Agreement- were not discussed publicly until the summer of 2018. They successfully managed to agree in October of 2018 to a protocol added to the Withdrawal Agreement after long negotiations. This protocol includes articles on Citizens rights, Air Transport Law, Fiscal Matters and Protection of Financial Interests, Environment Protection and Fishing, and Cooperation in Police and Customs Matters. All of these matters are of importance between Spain and Gibraltar due to ongoing disagreements in these areas. These disagreements will only increase after November because the Protocols do not seem to resolve these disagreements.

STRESSING that the orderly withdrawal of the United Kingdom from the Union in relation to Gibraltar implies that any potential negative effect on the close social and economic relations between Gibraltar and the surrounding area, in particular the territory of the municipalities that make up the Mancomunidad de Municipios del Campo de Gibraltar in the Kingdom of Spain, is adequately addressed,

TAKING NOTE of the commitment of the United Kingdom in respect of Gibraltar to address the payment of benefits in a satisfactory manner by 31 December 2020,

AIMING at continuing to promote balanced economic and social development in the area, in particular in terms of labour conditions, and continuing to ensure the highest levels of environmental protection in accordance with Union law, as well as continuing to strengthen security for the inhabitants of the area, in particular through cooperation in police and customs matters,

ACKNOWLEDGING the benefits for the economic development of the area arising from the free movement of persons under Union law, which will continue to apply during the transition period,

REAFFIRMING in particular the ambition to protect public health, and highlighting the necessity to fight against the serious health, social, and economic consequences of smoking.

EMPHASISING also the need to combat fraud and smuggling and to protect the financial

interests of all the parties concerned.

UNDERLINING that this Protocol is without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to sovereignty and jurisdiction,

TAKING NOTE of the Memoranda of Understanding concluded between the Kingdom of Spain and the United Kingdom on [xx] November 2018 in relation to citizens' rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement reached on [xx] November 2018 to conclude a treaty on taxation and the protection of financial interests.

In fact, when the final Withdrawal Agreement was published, before it was agreed by EU states, Spain argued initially that they would not agree to it because of a sentence in the document (not in the protocol) in Article 184.

Spain was not satisfied with Article 184 of the Withdrawal Agreement:

Article 184: "Negotiations on the future relationship"

"The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of [DD/MM/2018] and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period".

This is because the Article could be interpreted to mean that the future of Gibraltar is included in the negotiations of the future relations between the UK and the European Union, which would go against what it is initially agreed; a Spanish-UK negotiations over Gibraltar. Spain could ask for modification of the wording of the Article or the addition of a new clause, or they could even suggest that they would vote against the Withdrawal Agreement. However, according to Article 50 of the Lisbon Treaty, if there is no consensus, the Council would require a qualified majority (as well as the consent of the European Parliament) which would put Spain in a difficult position if it could not achieve support from the other countries. However after discussions with EU officials, in the end Spain agreed to the document.

The Protocol on Cyprus was slightly different since it specifically relied on the EU membership of Republic of Cyprus and thus a continuation of existing arrangements were agreed.

"CONFIRMING that the arrangements applicable to relations between the Union and the Sovereign Base Areas after the withdrawal of the United Kingdom from the Union should continue to be defined within the framework of the Republic of Cyprus' membership of the Union, TAKING ACCOUNT of the provisions concerning the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia ("the Sovereign Base Areas") set out in the Treaty concerning the Establishment of the Republic of Cyprus and the associated Exchanges of Notes dated 16 August 1960 ("the Treaty of Establishment"),".

With the recent events in British Politics, including the rejection of the Withdrawal Agreement and the first extension, it is unclear what kind of future there is going to be. However, with the upcoming deadline of 31st of October for Brexit and, at the time of writing, the lack of agreement over either a new extension or a new Withdrawal Agreement, the border between Gibraltar and Spain is put in a difficult position. As well as the Northern Ireland border, it is unclear what kind of pragmatic

solutions will be implemented to resolve the undesired outcome of no-deal. However, there are differences between the Northern Ireland border and the Gibraltar-Spain border. Gibraltar is not part of the EU Customs Union, and the border is small compared to the one in Ireland; however, there are around 14000 workers who cross the border into Gibraltar every day and many of them are EU citizens. Another pending issue are the rights of British citizens in Spain, whether with links to Gibraltar or not. With the highest number of British citizens living in the EU outside of the UK, Spain has recently claimed that their rights will be kept after Brexit, as long as the British Government reciprocate for Spaniards living in the UK.

Post-Brexit era

In 2002, Gibraltar had a referendum over its sovereignty and asked the question: "Do you approve of the principle that Britain and Spain should share sovereignty over Gibraltar?" 99% of the population voted "No", and therefore, it is not realistic to expect Gibraltar to become part of Spain in the near future, although it is unclear how ongoing low-key conflicts, around fishing, and surveillance of the Strait for example, will improve. Gibraltar provides income for around a quarter of the population of Campo de Gibraltar, a Spanish area with a population of a quarter of a million and almost 30% unemployment. A Gibraltar isolated from Spain would also be a barrier for Gibraltar's future: Like the border between Northern Ireland and the Republic of Ireland, the degree of interdependence between Spain and Gibraltar is considerable. In fact, less than a year after the Brexit referendum, a survey that took place in Gibraltar showed that 75% of young Gibraltarians (from 16 to 18 years old) would consider leaving if the border was affected by Brexit.

A discussion around identity, sovereignty and independence needs to take place which considers other long-term and unresolved matters in Europe. Spain has two enclaves in North Africa, Ceuta and Melilla, however, Morocco claims they should be part of their country. At the same time, and for many years, Catalonia has been asking for further delegation of power for its regional government; in recent times it has asked for a referendum on its independence (something that the Spanish Government denied). The crisis that started two years ago with the unofficial referendum in Catalonia has escalated, with Catalonia seeking to involve the EU and its countries. However, the EU decided that this was a Spanish matter, and it should be resolved at national level. These issues, along with similar ones (the referendum for the Scottish independence in 2014, the call for a new Brexit referendum, the final status of Gibraltar after October 2019) blurs the possibilities of where borders between, within, and outside the EU countries may lie in the future.

Final considerations

The evolution of borders over time signals the changes in the division of power among different countries. Since the Westphalia Treaty in 1648, European countries agreed to respect the principle of sovereignty of States. Even though this has not been always respected, the perception that each state should decide internally how to organise is still a significant notion at European level. The borders between countries should be respected under this principle, and with the development of International Law, disputes over borders brought different actors into the discussion, including the United Nations and its Special Committee on Decolonization in particular. This Committee in fact discussed in February at their special session issues around Gibraltar and Brexit and have discussed the case Gibraltar before the referendum of 2016 took place on many occasions. Despite the possible outcomes of Brexit, the process of Globalisation as well as Europeanisation will create more blurred borders and will potentially create higher degrees of interdependence and consequently less conflicts between States.

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